United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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n-2066

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

UNITED STATES OF AMERICA, :

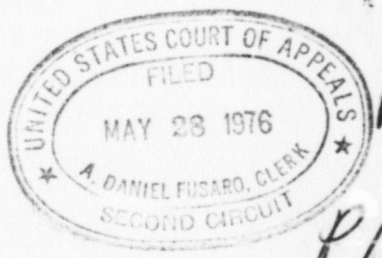
- v - : Docket No. 76-1236

ALBERTO MEJIAS, MARIO NAVAS, ESTELLA NAVAS, HENRY CIFUENTES-ROJAS, JOSE RAMIREZ-RIVERA, MANUEL FRANCISCO PADILLA MARTINEZ, and FRANCISCO CADENA, :

Defendants-Appellants. :

- x

76-1236



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P/S

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Alberto Mejias, Mario Navas, Estella Navas, Henry Cifuentes-Rojas, Jose Ramirez-Rivera, Manuel Francisco Padilla Martinez, and Francisco Cadena (hereinafter referred to collectively as "the defendants") appeal from an order of the United States District Court for the Southern District of New York, Robert L. Carter, District Judge, denying motions made by each of the defendants for release from custody pending trial.

Indictment 76 Cr. 164, filed on February 19, 1976 charged the appealing defendants and three others with conspiracy to violate the federal narcotics laws and four of the defendants with four counts of distributing and possessing narcotics with intent to distribute. On the

day the indictment was filed, the defendants were arrested and taken into federal custody. On May 17, 1976, hearings on several pretrial motions commenced before Judge Carter, and continued until May 21, 1976. On May 20, 1976 -- that is, on the 91st day after being taken into federal custody -- the defendants each moved pursuant to 18 U.S.C. §3164 and Rules 3 and 4 of the Southern District Plan for Achieving Prompt Disposition of Criminal Cases (hereinafter the "Interim Plan") for immediate release from custody. In an oral ruling announced on May 21, 1976, and in a memorandum opinion filed on May 24, 1976, these motions were denied.

Statement of Facts

Indictment 76 Cr. 164 was filed on February 19, 1976, and the appellants were taken into federal custody on that date. Prior to their federal arrest, the defendants had been in state custody for violations of state narcotics laws since September 3 or October 4 of 1974. Since the filing of the present federal indictment, however, no state detainers have been filed against them. Cash bail was set for each of the appealing defendants, and they have remained continuously in federal custody since the time of their arrest in February, 1976, in lieu

of bail.*

On March 30, 1976, a pretrial conference was held before Judge Carter, to whom the case was assigned for all purposes at the time of the arraignment of the defendants on February 23, 1976. At that time, Judge Carter informed defendants that the trial would begin sometime in May (P.T. 12).**

In addition to informing defendants when trial would begin, Judge Carter gave them a second opportunity to file pre-trial motions, ordering that they be filed by April 1, 1976, and he further stated that no motion would be considered properly filed without a memorandum of law (P.T. 22).

At the March 30 pre-trial hearing, all the defendants but Mario Navas and Estella Navas were represented by appointed counsel or the Federal Defenders Program of The Legal Aid Society. At the hearing, Howard Jacobs, Esq. was appointed to represent defendant Estella Navas.

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* Of the remaining defendants named in Indictment 76 Cr. 169, one has been released on bail and two are fugitives.

** The transcript of the March 30, 1976 pre-trial conference will be cited as P.T.

At his arraignment for bail setting purposes before Magistrate Gerard Goettel on February 19, 1976, defendant Mario Navas said he was represented by George Sheinberg, Esq., the attorney who had represented him with respect to the state charges against him. Because Mr. Sheinberg was not present at the arraignment, Howard Kay, Esq. was appointed to represent him for that limited purpose only. On or about April 9, 1976, the Government notified the Court that it had received no notice of appearance by George Sheinberg on behalf of defendant Mario Navas. The Court and the Government then spoke to Mr. Sheinberg who said he would speak to Mario Navas and notify the Court on the following Monday, April 12, 1976, if he was going to represent the defendant. Mr. Sheinberg did not make an appearance for defendant Navas and on or before Wednesday, April 15, 1976, Michael Stokamer, Esq., was appointed to represent defendant Navas.

On April 1, 1976, defendants Rojas and Valenzuela served omnibus motions without filing the memorandum of law although Judge Carter and Rule 9 of the General Rules of the United States District Court for the Southern District of New York require supporting memoranda of law on all motions. The only memorandum submitted was in support of the motion for a separate trial. On April 8, 1976 the Court denied these motions.

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On April 2, 1976, defendant Padilla served a memorandum of law in support of the speedy trial motion papers filed March 24, 1976. In addition, on the same day, Padilla also served a Notice of Motion and supporting affidavits to suppress tangible evidence seized and to suppress the wiretaps. He did not file a memorandum of law supporting these motions.

After the date set by Judge Carter to file motions, defendant Rev. Alberto Mejias served a memorandum of law in support of a motion to suppress tangible evidence. Defendant did not serve either a notice of motion or an affidavit in support of the motion.*

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* The memorandum of law, except for the cover, was a photocopy of the memorandum filed by the defendant Mejias in support of an identical suppression motion made with respect to state charges against the defendant.

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On April 16, 1976, defendant Estella Navas served an omnibus motion on the Government. Motions to dismiss the indictment for lack of a speedy trial and for a wiretap minimization hearing were the only motions supported by a memorandum of law.

On May 5, 1976, the Government filed a Notice of Readiness and on or about May 6, 1976, filed a Memorandum of Law in opposition to defendant Valenzuela's motion for a separate trial. This motion was the only motion made April 1, 1976 which defendant Valenzuela supported with a memorandum of law. Judge Carter denied the motion.

On or about May 12, 1976, the Government served and filed an affidavit and memorandum of law in opposition to motions by Rojas and Valenzuela for discovery and inspection and for a Bill of Particulars. The Government also served and filed at that time its Bill of Particulars.

On or before May 13, 1976, Judge Carter informed defendants that certain of their motions would be denied for lack of sufficient factual support unless additional facts were provided to the Court.

On May 13, 1976, defendant Rojas served an affirmation in support of his speedy trial motion.

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On May 14, 1976, the Government received a letter from defendant Estella Navas requesting it to produce witnesses in support of her speedy trial motion as well as an affidavit of her attorney in support of her speedy trial motion. The Government also received an affidavit of defendant Mejias in support of his motion to suppress tangible evidence, an omnibus motion and a memorandum of law of defendant Mario Navas which supported only his motion to suppress the wiretaps and an affidavit of defendant Padilla's attorney in support of his motion to suppress tangible evidence.

On Friday, May 14, 1976, the Government notified defense counsel that its papers were available in opposition to the motion to suppress the wiretaps on the ground that their interceptions were improperly minimized.

On Saturday, May 15, 1976, the Government received an affirmation in support of the motions of defendants Rojas and Valenzuela to suppress tangible evidence and to dismiss the indictment for lack of a speedy trial.

On Monday, May 17, 1976 - the date originally scheduled for trial - a hearing on the motion of defendant Mejias to suppress tangible evidence commenced. On Tuesday, May 18, 1976, defendant Rojas served a Notice of

Motion, affidavit and memorandum of law in support of a motion to suppress tangible evidence. On May 19, 1976, Judge Carter denied the motion as untimely and on May 24, 1976 denied the motion on the merits.

On May 20, 1976, counsel for each of the defendants moved for release pursuant to 18 U.S.C. §3164 and Rules 3 and 4 of the Interim Plan. On May 21, 1976, Judge Carter orally ruled that the motions were denied, and on May 24, 1976, he filed a carefully written 19-page opinion stating his reasons for the denial of the motions. While he found that each of the defendants had been in continuous federal custody for more than 90 days, and further that the commencement of pre-trial hearings did not constitute commencement of "trial" within the meaning of 18 U.S.C. § 3164, he reasoned that the exclusions from the 90-day period contained in 18 U.S.C. §3161(h) applied equally to the "Interim limits" set out in §3164. Thus, he concluded that the period of "delay resulting from hearings on pretrial motions" and "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement", 18 U.S.C. §3161(h)(1)(E) and (G), should be excluded in the computation of the 90 days as to each defendant.

Trial commenced with the selection of a jury on May 24, 1976, and is presently in progress.

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ARGUMENT

Summary

The decision of the District Court denying the appellants' application to be released from custody pending trial should be affirmed (1) because the delay of the commencement of the trial beyond the ninetieth day of custody is attributable to the fault of the appellants and their counsel; and (2) because the time for pre-trial motions is excluded from the computation of the ninety day period.

POINT I

DELAY DUE TO PRE-TRIAL MOTIONS IS EXCLUDED FROM THE TIME REQUIREMENTS FOR TRIAL OF DEFENDANTS IN CUSTODY

The appellants argue that the Speedy Trial Act of 1974, 18 U.S.C. § 3161 et seq., and the Amended Plan for Achieving Prompt Disposition of Criminal Cases (the Interim Plan) adopted by the United States District Court for the Southern District of New York mandate their release from custody. As Judge Carter demonstrated in his opinion, the appellants' claim is simply wrong. First, the Speedy Trial Act and the Interim Plan both exclude the period of delay while proceedings concerning the defendant are pending, including proceedings for pre-trial motions. There can be no dispute that the only reason this trial did not begin

within ninety days after the custody in this case began is that the Court was conducting a hearing on pre-trial motions in this case. The Speedy Trial Act, the Interim Plan and common sense all support Judge Carter's reasoning in finding that the excludable periods of Rule 6(a) of the Interim Plan and of 18 U.S.C. §3161(h) control and that the Court is not required to release the appellants.

Section 3161(h) of the Speedy Trial Act excludes various periods of delay "in computing the time within which the trial of any such offense must commence . . . ." There is an explicit exclusion of the period of "delay resulting from hearings on pre-trial motions . . ." 18 U.S.C. § 3161(h)(1)(E). The provision of the Speedy Trial Act on which appellants rely provides that:

> "No detainee, as defined in subsection (a), shall be held in custody pending trial after the expiration of such ninety-day period required for the commencement of his trial." 18 U.S.C. § 3164(c)

The Act requires that in computing the time within which the trial must commence, the delay for hearings on pre-trial motions must be excluded. Section 3164(c) on which appellants rely not only does not say that section 3161 does not apply to it but explicitly incorporates section 3161 within it. Moreover, the Speedy Trial Act is one entire act, and there is no basis within it for reading section

3161 out of section 3164.

The appellants argue that whenever the trial of any defendant in custody has not commenced ninety days after the custody began, the defendant must be released from custody. The appellants say that under the Interim Plan there are no exceptions to this rule and that in computing the ninety days, there are no excludable time periods. They further argue that even the time for any hearing or examination on the competency of the defendant to stand trial or any hearing on pre-trial motions is not excluded from the ninety days. They finally assert that they are entitled to release outright and that the Court has no power to set bail in order to insure their appearance at trial.

In making this argument, the appellants rely on 18 U.S.C. § 3164(c) and on Rule 4 of the Interim Plan. The appellants contend that both of these provisions require the release of any defendant held in custody more than ninety days if his trial has not commenced. In their view, the time periods designated as excludable periods under 18 U.S.C. §3161(h) and Rule 6 of the Interim Plan do not apply to defendants in custody more than ninety days. The appellants must concede that if these excludable periods applied to defendants in custody, there would be

such an exclusion in this case for the time period during which pre-trial motions were pending. The appellants claim, however, that 18 U.S.C. § 3164 and the Interim Plan established pursuant to its mandate do not incorporate the excludable periods that apply to the rest of the Speedy Trial Act.

The argument advanced by the appellants is based on treating in isolation the provisions of § 3164 of the Speedy Act relating to the "interim limits" during the period from October 1, 1975 to July 1, 1979. As Judge Carter pointed out, however, there is one Speedy Trial Act, divided into four operative sections, and one Interim Plan, divided into eleven operative provisions, and both the Act and the Interim Plan must be read in context. Section 3164 cannot be read as providing a comprehensive plan independent of the other provisions of the Act.

The "interim limits" provided in the Speedy Trial Act, 18 U.S.C. § 3164 simply make no sense if read out of context. Indeed the very first sentence of this section expressly incorporates § 3161(b) and § 3161(c). The Interim Plan has the same textual integrity. It cannot reasonably be read as one plan for defendants in custody and another for defendants not in custody. The division

into these categories of defendants in custody and those not in custody is intended, according to 18 U.S.C. § 3164(a), simply

> "to assure priority in the trial or other disposition of cases involving -- (1) detained persons who are being held in detention solely because they are awaiting trial ..." [emphasis added]

In pursuing that goal, however, it is obvious from the legislative history and the context of the Act that not all trials involving defendants in custody can commence within ninety days and that delay caused by hearings on pre-trial motions must be excluded from the ninety day period.

The legislative history of the Speedy Trial Act as well as the text of the Act demonstrate that the excludable periods of 18 U.S.C. § 3161(h) apply to 18 U.S.C. § 3164. Section 3164 is simply a temporary provision designed to provide priority to the trial of defendants in custody until the provisions of sections 3161(b) and (c) take full effect on July 1, 1979.* Section 3161(g) pro-

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* Although the Guidelines to the Administration of the "Speedy Trial Act of 1974" published by the Committee on the Administration of the Criminal Law of the Judicial Conference of the United States conclude that the interim limits of section 3164 are to continue until July 1, 1979 (page 27), there is an argument that the limits continue only until July 1, 1976. The interim limits apply until "the time limits provided for under section 3161(b) and

(Footnote continued on next page)

vides for a gradual reduction in the time periods established by section 3161(c) so that the courts will be able to adjust to the requirements of the Speedy Trial Act. Once the Act takes full effect, the excludable periods of section 3161(h) clearly apply to defendants who are in custody. The practical effect of the appellants' argument is that although the Speedy Trial Act is clearly designed to have much stricter requirements when the Act becomes fully effective in three years, defendants in the position of these appellants definitely would not be entitled to the automatic release from custody claimed by the appellants. After July 1, 1979, these defendants would not be released from custody. It would be anomalous in the extreme to read this Act in a way that would make its impact harsher now than it will be once it has fully taken effect.

Congress provided for the exclusion of certain periods because it explicitly recognized, in language not limited to that portion of the Act applicable after July 1, 1979, "the impossibility of providing rigid time limits for

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(Footnote continued from previous page)

section 3161(c) of this chapter become effective . . . ." 18 U.S.C. § 3164(a). It is not clear whether the effective date is July 1, 1976, as provided in section 3163, or July 1, 1979 when the "time limits" set out in sections 3161(b) and (c) become fully effective according to 18 U.S.C. § 3161(f) and (g).

the trial of criminal cases." House Committee on the Judiciary, Speedy Trial Act of 1974, Report on H.R. 17409, H. Rep. No. 93-1508, 93rd Cong., 2nd Sess., at 21 (1974) (House Committee Report). The excluded periods were provided so that the rights of defendants would not be swept aside by the rush to dispose of cases hastily. Id. at 15.

The appellants' argument illustrates precisely the problem Congress sought to avoid. This trial would have commenced within ninety days except for the delay caused by a suppression hearing on issues raised in final form at the eleventh hour. If the appellants prevail, in the future courts will be faced with two alternatives: either they must release from custody a defendant whom the court believes should be in custody, or the court must summarily deny any pre-trial motions pending at the conclusion of the ninety day period. This problem will be particularly troublesome in multi-defendant cases where some defendants are in custody, others are not and only those not in custody have motions pending. The court would have to grant an otherwise unnecessary severance or else the rights of some defendants would be sacrificed in order to protect conflicting rights of other defendants.

This conclusion is reinforced by an examination of periods of delay excluded by both the Speedy Trial Act, 18 U.S.C. § 3161(h), and by the Interim Plan, Rule 6.

One of the periods of delay is for a proceeding to determine the competency of a defendant. 18 U.S.C. § 3161(h)(1)(A). That determination almost invariably requires a lengthy period for psychiatric evaluation and for hearings and frequently arises in cases involving defendants accused of violent crimes. It is inconceivable that those defendants whose violent crimes suggest the need for psychiatric examinations either will have to be released or will have the time available for pyschiatric examinations determined not by the complexity of the examination but by the requirements of the Speedy Trial Act.

According to the appellants, there also would be no exclusion from the ninety day period for interlocutory appeals. Although interlocutory appeals are few they ordinarily arise when there is a difficult legal issue. The Government has a statutory right to appeal from a decision suppressing evidence if the decision is made before the defendant is placed in jeopardy. 18 U.S.C. § 3731. If the time for pretrial motions and for interlocutory appeals were not excluded from the ninety day period, the Government would be effectively denied this right of appeal when a defendant is in custody because of the difficulty of resolving such an issue quickly enough to enable the trial to commence within ninety days. If

the period of the pendency of pretrial motions and interlocutory appeals is not excluded, either the District Court and the Court of Appeals may be forced to rush to judgment without sufficient time to deliberate carefully or else defendants whom the courts have considered poor bail risks will be released.

The appellants' argument simply is inconsistent with the plain meaning of the Speedy Trial Act and of the Southern District Plan, both of which provide for periods of excludable delay which are essential to the sound administration of justice. The argument has a surface appeal only when the language from the Act and from the Plan relating to the interim period is lifted out of context. The Act and the Plan, read in their entirety and in the light of the Act's legislative history and with common sense, establish that the excludable periods are fully applicable during the interin period. The appellants' argument is without merit and must be rejected.

We recognize that United States v. Tirasso, Dkt. No. 76-1571 (9th Cir., March 26, 1976) and United States v. Soliah, Dkt. No. 75-523 (E.D. Cal.), support the appellants' position, but we respectfully submit that those cases were wrongly decided. Both opinions treat superficially the statutory language, the legislative history and the pre-trial implications that Judge Carter analyzed carefully, and we submit, correctly.

POINT II

THE RELEASE PROVISIONS BY THEIR TERMS DO NOT APPLY TO THE APPELLANTS

The provisions for release of detained defendants do not apply to the appellants even if the time for pre-trial motions is not excluded. The release provisions, 18 U.S.C. §3164 and Rule 4 of the Interim Plan, both apply only to a "defendant in custody solely because he is awaiting trial and whose trial has failed to commence through no fault of the accused or his attorney ...." The release provisions do not apply to these appellants because it was their "fault" that the trial had not commenced. Fault, in this context, is not, as Judge Carter appears to suggest (Opinion at 4 n.5), irresponsibility or incompetence. It was the defendants' motions that caused the hearings that delayed the trial. These motions had been made and denied earlier, but the Court ruled that the defendants would be permitted to renew their motions if they came forward with more substantial factual allegations. Those factual allegations were made on the day the trial was scheduled to commence,

although Rule 8(b) of the Southern District Rules requires motions to be made within ten days after arraignment. We are not criticizing defense counsel, but it was their fault that the trial failed to commence within ninety days because they caused the delay. If the Court equates fault with incompetence, irresponsibility or planned delay, such a reading will make necessary a new and extraordinarily difficult determination in order to compute the number of days "in custody". Whenever a motion is made prior to trial, and particularly toward the end of the 90-day period, it will be necessary to make a determination of counsel's good faith and whether the motion is made simply for purposes of delay. This standard is simply unworkable.

In addition, it can be said that the Act and the Interim Plan never applied to these appellants because their trial had commenced within ninety days. The trial in this case included the suppression hearing that began on the ninetieth day. We emphasize that this is not a case where the Government had been dilatory

in responding to defense motions or where the Court had the motions under advisement at the conclusion of the ninety day period. The Court actually was taking evidence in connection with this trial on the ninetieth day, and the trial may be considered to have commenced at that point.

Still another reason that the defendants should not be released in this case is that Rule 4(1) of the Southern District Interim Plan does not mandate absolute release but says only that when it applies the time limit expires the defendant

> "shall be released subject to such conditions as the court may impose in accordance with 18 U.S.C. 3146."

Read literally, as the appellants say it must be, this provision means only that a defendant cannot be held without bail. Bail must then be set under conditions that will insure the defendant's presence at trial. Judge Carter has set bail to meet that standard. If the appellants meet the bail conditions set by Judge Carter, they will of course be released. There is no

requirement in the Rule that the appellants be cleared without bail. The appellants have made no showing that the bail set by Judge Carter is unreasonable, and their claim must be denied.

CONCLUSION

The decision of the District Court denying appellants' motions for release from custody pending trial should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

LAWRENCE IASON, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 28th day of May 1976, he served a copy of the within Brief for the United States by placing the same in a properly postpaid franked envelope addressed:

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And deponent further says that he sealed the said envelopes and placed the same in the mail chute drop for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Lawrence Iason
LAWRENCE IASON
Assistant United States Attorney

Sworn to before me this
28th day of May, 1976

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 31-0753510
Qualified in Kings County
Commission Expires March 30, 1977